Supreme Court, U.S.
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No.97-

In The
# Supreme Court of the United States

October Term, 1997

LIBERTY NATIONAL LIFE INSURANCE COMPANY,
a corporation,

*Petitioner*,

*vs.*

SAMUEL L. DAY,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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48 pp

## QUESTION PRESENTED

Whether a United States District Court has discretion, under any circumstances, to consider a valid affirmative defense which is raised after trial but before entry of judgment?

## LIST OF PARTIES

Petitioner, Liberty National Life Insurance Company is controlled by its parent corporation, Torchmark Corporation. Petitioner and its parent have one subsidiary which is nonwholly owned, which is Waddell and Reed Financial, Inc.

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Petitioner, Liberty National Life Insurance Company, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 122 F.3d 1012 (1997) and is reproduced in the Appendix filed herewith at 1a. The unreported opinion of the District Court in this case is reproduced as Appendix B at 10a of the Appendix.

## STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on September 22, 1997. Petitioner timely filed a petition for rehearing with the Eleventh Circuit, which petition was denied on December 10, 1997. Appendix C. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Section 255(a) of the Portal-to-Portal Pay Act of 1947, as amended, 29 U.S.C. § 251 *et seq.*, provides in pertinent part:

> § 255(a) if the cause of action accrues on or after May 14, 1947 - may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

Prior to the enactment of the Civil Rights Act of 1991 on November 21, 1991, § 626(e)(1) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA") incorporated the above-quoted statute of limitations, providing:

> (e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling
>
> (1) Sections 255 and 259 of this title shall apply to actions under this chapter.

Since November 21, 1991, 29 U.S.C. §626(e) has provided as follows:

> § 626(e) Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

## STATEMENT OF THE CASE

Respondent, Samuel L. Day (hereinafter "Day" or "Respondent"), was terminated from his employment with Petitioner, Liberty National Life Insurance Company (hereinafter "Liberty National" or "Petitioner"), in May, 1991. On October 8, 1991, Respondent filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"). Subsequently, in response to Day's charge of discrimination, Day received a determination letter which indicated that he had two years from the date of the last discriminatory act to bring suit for any unintentional violation of the ADEA and three years from the time of the last discriminatory act to bring suit for a willful violation of the ADEA.

More than two years but less than three years after

Respondent was terminated, he brought this ADEA lawsuit in the United States District Court for the Northern District on Florida.[1] Subject matter jurisdiction in the district court was proper under 28 U.S.C. § 1331.

In his complaint, Respondent explicitly and affirmatively asserted that the lawsuit was brought within the three-year statute of limitations which applied to willful violations of the ADEA. The complaint provides in pertinent part:

> Plaintiff received a determination three days before his two year statute expired stating that he had three years to file a lawsuit. Plaintiff brings this lawsuit within three years of the discriminatory discharge to challenge intentional and willful violations of the Age Discrimination and [sic] Employment Act.

Appendix D at 22a-23a (¶ 2). Liberty National did not explicitly raise or affirmatively plead a statute of limitations defense prior to trial.

Following an initial trial which resulted in a deadlocked jury and a mistrial, the case was tried for a second time and submitted to a second jury. That jury made two findings. First, the jury found that age was a determining factor in the Respondent's termination. Second, the jury found that Petitioner's violation of the ADEA was not "willful". The jury assessed Respondent's damages as a result of the non-willful

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1. Respondent's last day of employment with Liberty National was May 8, 1991. The complaint was filed nearly three years later, on April 29, 1994.

violation of the ADEA at $300,000.00.

Based upon the jury's finding of no willfulness, Liberty National raised the statute of limitations as a bar to recovery. This argument was broached with the trial court after the jury returned its verdict, but before the entry of judgment. The court requested the parties to brief the statute of limitations issue, but, while the parties were preparing their briefs in this regard, the clerk of the court entered judgment on the jury's verdict in the amount of $300,000.00.

Liberty National timely moved the trial court to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e) based upon the expiration of the two-year "non-willful" statute of limitations. Liberty National's motion to alter or amend was well-taken by the trial court, and on June 12, 1996 District Judge Roger Vinson entered a memorandum opinion and order granting Liberty National's motion to alter or amend and directing the clerk to enter judgment in favor of Liberty National. Appendix B. Judge Vinson's memorandum opinion and order expressly addressed the fact that Liberty National did not affirmatively plead a statute of limitations defense in its answer or raise the issue prior to trial. Appendix B at 12-13a. The court pointed out that Respondent himself interjected the statute of limitations issue in the complaint by acknowledging the applicability of the three-year statute of limitations for willful violations of the ADEA. *Id.* In this light, Judge Vinson found that Day was not prejudiced by any failure to plead, and the court exercised its discretion to consider the statute of limitations defense. *Id.*

On appeal, the United States Court of Appeals for the Eleventh Circuit reversed the trial court and ordered the reinstatement of the jury's verdict. Appendix A. The court

held that the trial court abused its discretion in granting Petitioner's motion to alter or amend the judgment. The appellate court's reasoning hinged on the premise that Liberty National had waived its statute of limitations defense by failing to affirmatively plead that defense. The court of appeals did not acknowledge or address the trial court's discretion to consider a valid affirmative defense that is belatedly raised.

## REASONS FOR GRANTING WRIT

This Court should grant the writ of certiorari in this case in its supervisory role over the federal judiciary. This case goes to the structural roots of all judicial proceedings — the trial court's ability and discretion to control the course of proceedings before it. The Eleventh Circuit's Opinion in this case reflects a substantial encroachment on the district courts' ability to control the course of litigation at the trial level. The Eleventh Circuit invaded the province of its trial courts by reinstating a jury verdict which the district court had discarded due to a valid, albeit belatedly raised statute of limitations defense, without any consideration for the trial court's discretion to consider the valid defense. Moreover, a survey of opinions from the various circuits reveals the need for this Court's guidance with regard to the ability of the courts to consider a belatedly raised defense. There is a split of authority in the manner with which the circuits treat this issue, ranging from opinions that recognize the trial courts' broad discretion to hear belatedly raised defenses to opinions which apply a *per se* rule that a failure to timely plead a valid affirmative defense results in the waiver of that defense.

## I. The Eleventh Circuit's Opinion Reflects a Clear and Substantial Departure From the Accepted and Usual Course of Judicial Proceedings as Acknowledged by This Court.

### A. This Court Has Explicitly Acknowledged the United States District Courts' Broad Discretion to Hear and Consider Belatedly Raised Affirmative Defenses.

The Eleventh Circuit Court of Appeal's opinion in this case strikes significant discord with this Court's opinion in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 329-32 (1974). In Zenith Radio, a Sherman Act case, Hazeltine Research Inc. ("HRI") raised a statute of limitations defense to a counterclaim by Zenith. As in the case at bar, the statute of limitations defense was not raised in the pleadings or prior to trial. Indeed, in Zenith Radio, the limitations defense was not asserted until a year after the close of evidence and after the trial court made its findings of fact. *Id.* at 323. Unlike the present case, the trial court in Zenith Radio rejected the belatedly raised defense.[2] While the end result of Zenith Radio was the rejection of the statute of limitations defense, this Court's analysis in reaching that conclusion clearly indicates the breadth of district courts' discretion to allow parties to assert defenses after the close of trial. To this end, the Court stated:

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2. The trial court's opinion was unclear as to whether the trial court had rejected the statute of limitations defense on its merits or if the trial court had simply refused to allow HRI to belatedly raise the defense. *Id.* at 329. Because of this lack of clarity, the Supreme Court considered each of these alternatives.

> On the assumption that the trial court did hold the defenses of limitations and release to have been waived, we cannot say that the judge abused his discretion or stressed too much the value of avoiding reopening a trial to litigate matter that HRI had had an opportunity, but neglected, to litigate.

*Id.* at 332. Addressing the trial court's discretion to allow the belated defense this Court stated:

> It is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court. Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. d. 2d 222 (1962)(dictum). In a matter as substantial and complex as this one where HRI claimed it had been misled or at the very least asked to be relieved of mistake or oversight, it might have been within the discretion of the trial judge to have permitted HRI to amend its pleadings to include therein the defenses of limitations and release. But, in deciding whether to permit such an amendment, the trial court was required to take into account any prejudice that Zenith would have suffered as a result . . .

*Id.* at 330-1. This Court went on to note that allowing the amendment under the circumstances of that case would have resulted in substantial prejudice to Zenith because it would

have necessitated a "virtual retrial of the issue of damages."[3] Even though permitting the belated defense in that context would have placed a heavy burden on Zenith, this Court noted that the trial court might have utilized its discretion to entertain the belatedly raised defense by reopening the case to allow additional proof required by the introduction of the statute of limitations issue. *Id.* at 331 ("The trial judge here might have permitted reopening. Like a motion under Rule 15(a) to amend the pleadings, a motion to reopen to submit additional proof is addressed to his sound discretion.").

Whereas in Zenith Radio this Court expressed the opinion that the trial court had broad discretion to decide whether or not to consider a statute of limitations defense that was not raised until over a year after trial, the Eleventh Circuit in the present case rebuked the trial court for exercising its discretion to consider a valid defense which was raised immediately upon the return of the jury's verdict.

B. The Eleventh Circuit Failed to Acknowledge the Trial Court's Discretion to Consider a Valid Affirmative Defense.

It bears emphasis that Eleventh Circuit Court of Appeals' opinion in this case does not merely reflect a misapplication of an appropriately stated standard of review. It is true that the Eleventh Circuit did state that it reviewed the district court's grant of Petitioner's Rule 59 motion to alter or amend the judgment for abuse of discretion. However, the

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3. Unlike the present case, the statute of limitations in Zenith Radio was not offered as an absolute bar to recovery. Rather, the defense was asserted to limit Zenith's recovery to only those damages resulting from Sherman Act violations occurring within the limitations period.

premise for the court's holding was that the trial court abused its discretion because Petitioner had waived the statute of limitations defense. Appendix A at 7-8a. As such, the court of appeals failed to recognize the district court's discretion to consider the belatedly raised statute of limitations defense. *See*, Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 at 331-2.

The Eleventh Circuit's failure in this regard is highlighted by its discussion of Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985). As stated by the Eleventh Circuit in the present case:

> In [Heiar], the County pled the statute of limitation in its answer but did not allude to the matter again in the district court. **The County attempted to raise it before the appellate court** which rejected the effort. Of particular importance to the court was the fact that 'had the plaintiffs known that this statute of limitations was in play they might have presented evidence in the district court to show that the defendants had tolled it. . . .' *Id.* at 1197. Similarly, in this case, if Liberty had brought the limitations issue to the attention of the court during the second trial, Day could have offered evidence that the statute was tolled during some period of time or have insisted that the instructions reflect the effect of the statute of limitations on any possible recovery by him. Since day did not refer to the limitations question until after the jury returned its verdict, those options were not available to Day.

Appendix A at 7a (emphasis added). The distinction between Heiar and the case at bar is crucial. Raising a defense for the first time before a court of appeals would rob the trial court of its discretion to control the course of proceedings and the orderly presentation of evidence. As the Seventh Circuit appropriately held in Heiar, allowing a statute of limitations defense that was not raised with the trial court to be considered by the court of appeals would not allow the plaintiff an opportunity to present evidence of tolling.

In the present case, by contrast, the statute of limitations defense was raised with the trial court, and, as the Supreme Court noted in Zenith Radio, *supra*, the trial court had the discretion to reopen the evidence and allow Respondent to perfect its proof with regard to any tolling issue. The fact that the trial court in this case did not reopen the case on the tolling issue is not surprising and does not support an abuse of discretion argument. There is no indication in the record that Respondent ever sought to present any evidence that the two-year non-willful statute of limitations should be tolled, and, presumably, the trial court heard sufficient evidence throughout the course of proceedings to conclude that there was no tolling issue in this case.[4] Importantly, the district court specifically

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4. Interestingly, while it is unimportant to the central issue presented by this case, the circuits are united in holding that the only reason that the Respondent in this case had the benefit of the two-year/three-year terraced statute of limitations in the first place derives from equitable tolling principles. Prior to the Civil Rights Act of 1991, the ADEA incorporated the statute of limitations provision contained in the Portal-to-Portal Pay Act of 1947, 29 U.S.C. § 255. Section 255(a) is the source of the two-year statute of limitations period for non-willful ADEA discrimination as well as the three-year statute of limitations for willful violations of the ADEA. The Civil Rights Act of 1991 amended the ADEA to provide that suit must be brought within 90 days of receiving a determination letter from the EEOC. 29 U.S.C. § 626(e). While

found that Respondent was not prejudiced by the belated raising of the statute of limitations issue. Appendix B at 12-13a. The district court was especially mindful of the fact that Respondent's complaint interjected the statute of limitations into this case by explicitly pleading that the complaint was filed within the three-year statute of limitations applying to willful violations of the ADEA. *Id.*

## II. There is a Split Between the Circuits Regarding the Articulated Rule for the Deference Afforded a Trial Court to Consider a Belatedly Raised Affirmative Defense.

The need for this Court's guidance with respect to belatedly raised affirmative defenses is manifest considering the divergence found in the case law where the circuit courts

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Respondent was terminated and filed his charge of discrimination just prior to the effective date of the Civil Rights Act of 1991 (November 21, 1991) the complaint was not filed until April, 1994. Each circuit that has addressed the issue has concluded that the amended, 90-day statute of limitations period applies to all suits filed after the effective date of the 1991 act, irrespective of when the last discriminatory act occured. Browning v. AT&T Paradyne, 120 F.3d 222 (11th Cir. 1997); Zotos v. Lindbergh School District, 121 F.3d 356 (8th Cir. 1997); St. Louis v. Texas Worker's Compensation Commision, 65 F.3d 43 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 2563, 135 L. Ed. 2d 1080 (1996); Garfield v. J.C. Nichols Real Estate, 57 F.3d 662 (8th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 380, 133 L. Ed. 2d 303 (1995); Vernon v. Cassadaga Valley Central School District, 49 F.3d 886 (2nd Cir. 1995). However, where, as here, the plaintiff is informed by the EEOC or an appropriate state agency that the longer statute of limitations period applies to his or her claim, then the statute of limitations may be equitably tolled. Browning v. AT&T Paradyne, *supra*. In any event, for purposes of this case, Petitioner does not contest that the Respondent should be given the benefit of the statute of limitations stated in the Portal-to-Portal Pay Act, 29 U.S.C. § 255.

have addressed this issue. In this case, for instance, the Eleventh Circuit articulates a *per se* rule that an unpled affirmative defense is waived. Similarly, in Pearce v. Wichita County, 590 F.2d 128 (5th Cir. 1979), the Fifth Circuit stated:

> Appellant did not raise the [statute of limitations] defense in its pleadings or in objection to the court's jury instructions. Indeed, appellant did not bring the issue to the court's attention until it presented a motion for judgment notwithstanding the verdict. Consequently, appellant has waived any objection to the limitations period.

590 F.2d at 134. The circuit court in the present case also adopted a *per se* rule in this case, holding that "regardless of the allegations of a complaint, the federal rules specifically require that the affirmative defense of the statute of limitations be separately plead." Appendix A at 6a.

The D.C. Circuit has also recently articulated a clear *per se* rule that an affirmative defense is forfeited when it is not pled. Harris v. Secretary, U.S. Department of Veterans Affairs, 126 U.S. 339 (D.C. Cir. 1997). In Harris, the trial court had granted summary judgment on a meritorious statute of limitations defense which was not pled in the defendant's answer but which was asserted in defendant's motion for summary judgment. The D.C. Circuit reversed, holding that the unpled affirmative defense was necessarily forfeited by the defendant. *Id.* ("Rule 8(c) means what it says: affirmative defenses must be raised in a responsive pleading, not a dispositive motion.").

In contrast to this *per se* waiver approach, other courts

candidly recognize the trial courts' broad discretion to consider belatedly raised affirmative defenses. *See, e.g.*, Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1374 (3rd Cir. 1993) ("Although the College did not assert the defense of immunity under the Act in its answer, it did raise this defense in paragraph nine of its motion for summary judgment. Even though a motion for summary judgment is not the most appropriate way to raise a previously unpled defense of immunity, we think it would be inappropriate in the present case to decide the immunity issue on the basis of waiver."); Phelps v. McClellan, 30 F.3d 658, 662-3 (6th Cir. 1994) (noting that there are "numerous exceptions" to the rule that failure to plead an affirmative defense results in its waiver); Moore, Owen, Thomas & Co. v. Coffey, 992 F.2d 1439, 1445 (6th Cir. 1993) ("It is well established, however, that failure to raise an affirmative defense by responsive pleading does not always result in waiver."); Camarillo v. McCarthy, 998 F.2d 638, 639 (9th Cir. 1993) ("In the absence of a showing of prejudice, an affirmative defense may be raised for the first time at summary judgment."); Blaney v. United States, 34 F.3d 509 (7th Cir. 1994) (holding that where a district court "chose to recognize the timeliness issue as a defense, the defendants cannot be deemed to have waived the issue."). Perhaps most interesting and instructive is the 7th Circuit's opinion in Emich Motors Corp. v. General Motors Corp., 229 F.2d 714 (7th Cir. 1956). In Emich, as in the present case, the defendant raised a valid statute of limitations defense at the conclusion of trial. 229 F.2d at 715. Like the present case, the trial court considered the meritorious, albeit belatedly raised statute of limitations defense and granted judgment in favor of the defendant as a matter of law. *Id.* Unlike the present case, however, the Seventh Circuit affirmed the trial court's grant of summary judgment, acknowledging the trial court's broad discretion in this regard. *Id.* The Emich court keyed in on this Court's

language in a pre-rules case:

> 'It is well settled that ... a defendant who desires to avail himself of a statute of limitation as a defense must raise the question *either in the pleading, or on the trial, or before judgment.*'

229 F.2d at 717, *quoting*, Retzer v. Wood, 109 U.S. 185, 187, (1884) (emphasis in Emich).

As this Court noted in Conley v. Gibson, 355 U.S. 41 (1957);

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

355 US. at 48. This Court pointed out in Zenith Radio, *supra*, that there are situations where the trial court will have discretion to reject a meritorious defense when that defense is raised after trial and the delay prejudices the opposing party, but, by the same token, this Court observed that the trial court has discretion to consider a belatedly raised defense on its merits and to allow the parties to perfect their proof with regard to that defense. 401 U.S. at 330-2.

In the present case, the district court, exercised its sound discretion to reach the merits of a valid defense. Moreover, as noted by Judge Vinson, the statute of limitations defense in this case was one which Respondent explicitly addressed in his complaint. The Eleventh Circuit applied a *per se* waiver rule which usurped the district court's discretion to control the

manner of pleadings and the course of litigation below. That rule conflicts with the rule applied in other circuit courts of appeals' which allows the trial court the discretion to consider a belatedly raised, unpled affirmative defense.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Court of Appeals, and this Court should reject the *per se* rule and grant the trial courts of this land the discretion to consider unpled affirmative defenses when raised by subsequent means, including post-trial motions.

Respectfully submitted,

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